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RUMINATIONS ON DISSEMINATION: LIMITS ON ADMINISTRATIVE AND JUDICIAL REVIEW UNDER THE INFORMATION QUALITY ACT

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Supporters call it "one of the most significant developments in the federal rulemaking system since passage of the Administrative Procedure Act."[1] Opponents suggest that it "may well prove the most destructive half-page of law that most people do not know is on the books."[2] It is the Information Quality Act, enacted in 2000 as a two paragraph rider to appropriations legislation for the 2001 fiscal year.[3] While it was supposed to improve the quality of information that the government relies upon in decision making, critics assert that the Act contributes to the ossification of rulemaking,[4] encourages agencies to make decisions informally through guidance documents and policies, rather than formally through rules, reduces government disclosure of information,[5] creates a bias in government decision making toward industry-backed science,[6] and fundamentally changes the manner in which the government evaluates risks in decision making.[7]

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1. *See* U.S. Chamber of Commerce, Data Quality, http://www.uschamber.com/issues/index/regulatory/ataquality.htm (last visited Nov. 17, 2005).

2. THOMAS O. MCGARITY ET AL., CTR. FOR PROGRESSIVE REGULATION, PUBL'N NO. 502, TRUTH AND SCIENCE BETRAYED: THE CASES AGAINST THE INFORMATION QUALITY ACT 1 (2005), http://www.progressiveregulation.org/articles/iqa.pdf.

3. Treasury and General Government Appropriations Act, 2001, Pub. L. No. 106-554 app. C, § 515, 114 Stat. 2763A-125, 2763A-153 to 2763A-154 (codified at 44 U.S.C. § 3516 note (2000) (Policy and Procedural Guidelines)).

4. *See* MCGARITY ET AL., *supra* note 2, at 10-12; Thomas O. McGarity, *Our Science Is Sound Science and Their Science Is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 U. KAN. L. REV. 897, 935 (2004); Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, 28 WILLIAM & MARY ENVTL. L. & POL'Y REV. 339, 364 (2004).

5. *See* John D. Echeverria & Julie B. Kaplan, *Poisonous Procedural "Reform": In Defense of Environmental Right-To-Know*, 12 KAN. J.L. & PUB. POL'Y 579, 602 (2003); McGarity, *supra* note 4, at 935; Shapiro, *supra* note 4, at 358-61.

6. *See* Echeverria & Kaplan, *supra* note 5, at 603-04; Shapiro, *supra* note 4, at 350; Wendy E. Wagner, *Importing* Daubert *to Administrative Agencies Through the Information Quality Act*, 12 J.L. & POL'Y 589, 607-12 (2004).

7. *See* MCGARITY ET AL., *supra* note 2, at 14-20; Shapiro, *supra* note 4, at 350-57.

In the five years since the Act was adopted, it has been used to challenge the findings of a major global warming report,[8] to prevent the listing of plants[9] and animals[10] as endangered species, and to delay the imposition of stricter controls on the herbicide atrazine.[11] It has also been used to challenge a decision of the Department of Agriculture to rely on a World Health Organization report to recommend lower sugar intake as part of dietary guidelines[12] and to challenge a report of the Consumer Product Safety Commission that was aimed at preventing fires that could be caused by electric clothes dryers.[13]

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8. *See, e.g.*, Petition from Christopher C. Horner, Counsel, Competitive Enterprise Inst., to Nat'l Oceanic & Atmospheric Admin., Request for Correction of Information: Petition To Cease Dissemination of the National Assessment on Climate Change, Pursuant to the Federal Data Quality Act 6 (Feb. 19, 2003), http://www.cei.org/pdf/3374.pdf. The Competitive Enterprise Institute sent a similar request to the Environmental Protection Agency (EPA). *See* Petition from Christopher C. Horner, Senior Fellow, Competitive Enterprise Inst., to U.S. Envtl. Prot. Agency, Request for Response to/Renewal of Federal Data Quality Act Petition Against Further Dissemination of "Climate Action Report 2002," (Feb. 10, 2003), http://www.cei.org/gencon/027,03375.cfm.

9. *See, e.g.*, OMB Watch, Data Quality Challenge Helps Bump Species from Consideration for Endangered List (Aug. 9, 2004), http://www.ombwatch.org/article/articleview/2328. In March 2003 the United States Fish and Wildlife Service received a petition from an Air Force ecologist challenging the scientific data that the agency was relying on to support the proposed listing of slickspot peppergrass as an endangered plant. *See id.* After receiving the challenge, the agency withdrew its proposed rule that would have listed the grass as an endangered species. *See* Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule, 69 Fed. Reg. 3094 (Jan. 22, 2004).

10. *See, e.g.*, Challenge of Partnership for the West Pursuant to the Information Quality Act at 1-2, P'ship for the West v. U.S. Dep't of the Interior (Dep't of the Interior Sept. 23, 2004), *available at* http://www.fws.gov/informationquality/topics/FY2004/Sage Grouse/Complaint 23 sep 2004.pdf. In September 2003, the Partnership for the West filed an Information Quality Act correction request with the United States Fish and Wildlife Service to challenge the studies that the agency was relying on in proposing to list the greater sage grouse as an endangered species. *See id.* After the challenge, the agency determined that the sage grouse should not be listed as endangered. *See* OMB Watch, Sage Grouse Recommendation Follows Data Quality Act Challenge (Dec. 13, 2004), http://www.ombwatch.org/article/articleview/2568.

11. *See* Request for Correction of Information Contained in the Atrazine Environmental Risk Assessment, Ctr. for Regulatory Effectiveness v. U.S. Envtl. Prot. Agency, No. OPP – 34237A (Envtl. Prot. Agency Nov. 25, 2002), *available at* http://www.epa.gov/quality/informationguidelines/documents/2807.pdf. When the EPA was considering re-registration of the herbicide, the Center for Regulatory Effectiveness filed a petition to challenge studies that the agency was relying on because some other industry-funded studies conflicted with those studies. *See id.* The EPA may delay action on the re-registration request while it conducts further studies in light of the petition. *See* MCGARITY ET AL., *supra* note 2, at 14-15.

12. *See* Petition from Ctr. for Regulatory Effectiveness & Jim J. Tozzi, to Dep't of Agriculture, Request for Correction of Information Contained in a World Health Organization Report (Sept. 8, 2003), http://www.thecre.com/pdf/20030908_correction.pdf.

13. *See* MCGARITY ET AL., *supra* note 2, at 13.

The Act has generated a fair amount of scholarly debate, and important questions have been raised in that debate regarding whether the Information Quality Act applies to rulemaking and whether judicial review is available to ensure compliance with the Act.[14] When these questions are ultimately resolved, it is likely that administrative and judicial review under the Act will be quite limited. After providing some background on the Act in Part I, this Article examines the rulemaking question in Part II and the judicial review question in Part III.

I. THE INFORMATION QUALITY ACT

The Information Quality Act directs the Office of Management and Budget (OMB) to issue guidelines "that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by Federal agencies in fulfillment of the purposes and provisions of . . . the Paperwork Reduction Act."[15] The Act also requires federal agencies to issue their own information quality guidelines, to "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with [OMB] guidelines,"[16] and to file periodic reports with OMB that detail the number and nature of information quality complaints the agency receives and the manner in which the agency addresses those complaints.[17]

The Act applies to information that is disseminated by federal agencies. According to OMB, dissemination includes any "agency initiated or sponsored distribution of information to the public," regardless of whether the information is created by the government or reported to the government.[18] Consequently, the Act applies when federal agencies distribute guidance documents or educational materials, issue reports, make scientific studies or databases available to the public,

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14. *See, e.g.*, James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J.L. & PUB. POL'Y 521, 538-45 (2003); Shapiro, *supra* note 4, at 363-74.

15. 44 U.S.C. § 3516 note (2000) (Policy and Procedural Guidelines).

16. *Id.*

17. *Id.*

18. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452, 8460 (Feb. 22, 2002). Agency "initiated" information includes information that the agency prepared as well as information prepared by an outside party that the agency distributes "in a manner that reasonably suggests that the agency agrees with the information." *Id.* at 8454. Agency "sponsored" information includes "situations where an agency has directed a third-party to disseminate information, or where the agency has the authority to review and approve the information before release." *Id.*

or post materials on their websites, among other activities.[19] Although the Act does not apply to the disclosure of information in adjudication,[20] it probably applies to the disclosure of information in rulemaking, as discussed below.

OMB's guidelines, issued in 2002, require agencies to ensure that all information that they disseminate is presented in a clear and unbiased manner and to ensure that certain "influential" studies and data are presented with sufficient transparency to ensure that others can reproduce the results.[21] In addition, the guidelines require agencies to "adopt or adapt" the data quality standards of the Safe Drinking Water Act when they disseminate information about environmental, health, or safety risks.[22]

The guidelines also provide more detail regarding the "corrections mechanisms" required by the Information Quality Act.[23] Pursuant to the guidelines, each agency must establish administrative procedures that allow persons to seek and obtain correction of information that the agency disseminates that does not meet the data quality standards established by OMB or the agencies.[24] Furthermore, the guidelines require each agency to establish an administrative appeals process for persons who wish to challenge the agency's response to an information correction request.[25] The guidelines do not, however, require agencies to

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19. *See id.* at 8452.

> Dissemination does not[, however,] include distribution limited to government employees or agency contractors or grantees; intra- or inter-agency use or sharing of government information; and responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law. This definition also does not include distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes.

Id. at 8460.

20. *Id.* at 8460.

21. *Id.* at 8459-60.

22. *Id.* at 8460.

23. *Id.* at 8452.

24. *Id.* at 8459. In the preamble to the guidelines, OMB noted that since "many agencies already have a process in place to respond to public concerns, it is not necessarily OMB's intent to require these agencies to establish a new or different process." *Id.* at 8458. The agency should specify, in the procedures, the time period in which corrections will be made and the agency must notify persons who seek corrections whether the agency changes the information. *Id.* at 8459.

25. *Id.* at 8459. Once again, though, the preamble to OMB guidelines suggests that preexisting procedures that agencies use to respond to public concern could serve the administrative appeal function required by the guidelines as long as affected parties could raise their data quality claims through those procedures. *Id.*

provide third parties with any opportunity to challenge the agency's response to an information correction request.[26]

After OMB issued the Information Quality Act guidelines, it imposed additional requirements on agencies under the authority of the Act when it issued a "Final Information Quality Bulletin for Peer Review" in December 2004.[27] The bulletin created detailed requirements for peer review of scientific information that agencies disseminate, and focused on the timing of peer reviews, selection of reviewers, transparency of review, and opportunities for public participation in review, among other factors.[28]

II. APPLICATION TO RULEMAKING

When OMB issued its information quality guidelines, it suggested that the Information Quality Act, and the guidelines, applied to rulemaking.[29] OMB subsequently softened its position and issued guidance that suggests that agencies normally do not have to initiate separate administrative procedures to address complaints regarding the quality of data used in rulemaking.[30] However, the guidance requires agencies to address complaints raised in rulemaking in separate administrative proceedings when necessary "to avoid the potential for actual harm or undue delay."[31] In addition, the guidance stresses that the *substantive* requirements of the Information Quality Act and guidelines still apply to

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26. *See id.* at 8458.

27. *See* Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2664 (Jan. 14, 2005). Although the Information Quality Act does not explicitly require agencies to conduct external peer review on studies used by agencies, OMB cites the Act as its authority for the peer review requirements. *Id.* at 2666.

28. *Id.* at 2667-71. The bulletin set standards for peer review of "influential scientific information," *id.*, and more stringent standards for "highly influential scientific assessments," *id.* at 2671-72, 2675-76. "'Influential scientific information' means scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions." *Id.* at 2667. Scientific assessments are "'highly influential' if the agency or [OMB] . . . determine[] that the dissemination could have a potential impact of more than $500 million in any one year . . . or . . . is novel, controversial, or precedent-setting, or has significant interagency interest." *Id.* at 2671.

29. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. at 8454.

30. *See* Office of Mgmt. & Budget, Information Quality Guidelines—Principles and Model Language (Sept. 5, 2002), http://www.eeoc.gov/policy/guidelines/pmcmemo.pdf. OMB guidance suggests that "[w]here existing public comment procedures—for rulemakings, adjudications, other agency actions or information products—provide well-established procedural safeguards that allow affected persons to contest information quality on a timely basis, agencies may use those procedures to respond to information quality complaints." *Id.* at 1.

31. *Id.* at 1.

information initiated or sponsored by agencies in rulemaking.[32] Critics of the Act oppose the application of the guidelines to rulemaking, since they fear the guidelines will further ossify the rulemaking process.[33]

Since the Information Quality Act includes both substantive and procedural requirements, and since OMB's guidance addresses each separately, the question of whether the Act applies to rulemaking should actually be two separate questions: (1) Do the substantive requirements of the Act apply to rulemaking?; and (2) Do the procedural requirements of the Act apply to rulemaking?

Substantively, the Information Quality Act requires OMB and agencies to develop guidance that "ensure[s] and maximize[s] the quality, objectivity, utility, and integrity of information . . . disseminated by Federal agencies."[34] Procedurally, the Act requires agencies to "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under [the Act]."[35]

Addressing the substantive question first, it seems clear that Congress intended that information disclosed by agencies in rulemaking should meet the same standards for quality, objectivity, utility, and integrity as information posted on agency websites, included in agency reports, or disclosed in agency guidance and policy documents. The Information Quality Act applies to information "disseminated" by agencies.[36] Professor Sidney Shapiro argues that agencies do not disseminate information in rulemaking because the dictionary definition of disseminate means "'to spread or give out something, especially news, information, ideas, etc., to a lot of people,'" and that agencies do not bring information to lots of people in rulemaking.[37] Instead, he argues, people "seek out" information in rulemaking.[38] It makes sense to adopt a textualist approach to interpret the Information Quality Act, since there is no legislative history for the Act, and the Act does not include a statement of findings or purposes.[39] However, Professor Shapiro's interpretation of the statute seems to rest on a strained reading of the definition of disseminate as applied to rulemaking. Agencies are giving out information in rulemaking just as they are giving out information

32. *See id.*

33. *See, e.g.*, Shapiro, *supra* note 4, at 364.

34. 44 U.S.C. § 3516 note (2000) (Policy and Procedural Guidelines).

35. *Id.*

36. *Id.*

37. *See* Shapiro, *supra* note 4, at 364 (quoting CAMBRIDGE ADVANCED LEARNER'S DICTIONARY, http://dictionary.cambridge.org).

38. *Id.*

39. *See* MCGARITY ET AL., *supra* note 2, at 2.

when they publish reports or put information on the Internet. In fact, since agencies will be basing regulations on the information that is disclosed in rulemaking, it may be more important to ensure that the information gets to the public, so that the public can review it and provide input to the agency, than when an agency publishes a report or puts information on the Internet.[40]

Furthermore, it seems strange to suggest that Congress would insist that federal agencies must take steps to ensure that the information that they rely on is accurate and objective when they publish reports, post information on the Internet, and issue policies and guidance documents, none of which have any legally binding effect on the public, but that agencies do not have to take those same steps when they are making rules that will have the force of law. Statutes should not be interpreted in a manner that leads to an absurd result.[41] If Congress intended to exclude information disclosed in rulemaking from the substantive requirements of the Information Quality Act, it could have done so explicitly.[42]

While it seems clear that the substantive requirements of the Information Quality Act may apply to rulemaking, it seems equally clear that the procedural requirements of the Act should not. Persons who object to the quality, objectivity, utility, or integrity of information that agencies disseminate in the course of rulemaking can raise their concerns regarding the information as comments during the notice and comment proceedings for the rule.[43] Agencies must respond to those comments in a rational manner or the rule that they adopt could be invalidated in court.[44] If agencies determine that information quality concerns raised in

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40. In addition, in interpreting the term disseminate, Professor Shapiro focuses on the fact that the dictionary that he selected defines disseminate as spreading out information to "a lot of people." *See* Shapiro, *supra* note 4, at 364. Several other dictionaries do not limit dissemination to distribution to a lot of people. *See, e.g.*, Merriam-Webster Online Dictionary, Definition of Dissemination, http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=disseminate (last visited Nov. 19, 2005); MSN Encarta Online Dictionary, Disseminate, http://encarta.msn.com/dictionary_/disseminate.html (last visited Nov. 19, 2005). In fact, *The American Heritage Dictionary* defines disseminate as promulgate, a term frequently used to refer to the rulemaking process. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), http://www.bartleby.com/61/72/D0287200.html.

41. *See* Clinton v. City of New York, 524 U.S. 417, 429 (1998) (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 574 (1982)); Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

42. *See* Conrad, *supra* note 14, at 541.

43. *See* 5 U.S.C. § 553(c) (2000).

44. *See id.* § 702. When reviewing a rule issued by an agency, courts will apply the judicial review standards of the Administrative Procedure Act (APA). *See id.* §§ 701-706. Under the judicial review procedures of the APA, a court can set aside agency actions if they are arbitrary and capricious or if the agency does not follow procedures required by

rulemaking are valid, they may change the information or decide that they will no longer disseminate the information.[45] Since there are "administrative mechanisms" to address information quality concerns in rulemaking, Congress could not have intended to require agencies to establish additional administrative procedures to respond to those concerns in rulemaking when it required agencies to "establish administrative mechanisms allowing affected persons to seek and obtain correction of information . . . that does not comply with [information quality guidelines]."[46] As Professor Shapiro notes, the procedural requirement for administrative mechanisms was most likely included by Congress to apply to information disclosed in reports and on the Internet, where there were no existing procedures to address information quality concerns.[47] Professor Shapiro also notes that businesses already have significantly greater opportunities to review and influence the quality of information used in rulemaking, before and during the rulemaking, than they have to review and influence the quality of other information disseminated by agencies, so it is unlikely that Congress intended to layer additional procedural requirements on the rulemaking process.[48]

The rulemaking process is also a more transparent process within which to address information quality concerns. Through the government's electronic rulemaking initiative,[49] many agencies post comments on proposed rules on the Internet in a docket for the rulemaking.[50] Thus, complaints regarding information disseminated by agencies in a rulemaking are posted next to the information that is being

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law. *See id.* § 706. Courts have interpreted the APA's requirement that agencies must provide a "concise general statement of . . . basis and purpose" of a final rule, *id.* § 553(c), to mean that agencies must address and rationally respond to the public comments that they receive on a proposed rule. *See, e.g.*, Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1566 (11th Cir. 1985); United States v. Nova Scotia Food Prods., 568 F.2d 240, 252-53 (2d Cir. 1977).

45. 44 U.S.C. § 3516 note (2000) (Policy and Procedural Guidelines).

46. *Id.*

47. *See* Shapiro, *supra* note 4, at 365-66.

48. *Id.* at 366-67.

49. E-Government Act of 2002, Pub. L. No. 107-347, 166 Stat. 2899 (codified as amended in scattered sections of 44 U.S.C.).

50. *See* 44 U.S.C.A. § 3501 note (West Supp. 2005) (Federal Management and Promotion of Electronic Government Services). The E-Government Act of 2002 requires the federal government to establish a portal to centralize access to government information on the Internet and requires federal agencies to accept electronic submissions in rulemaking, create electronic dockets for rulemaking, and to make information that must be published in the *Federal Register* available on the Internet. *Id.* The Internet portal required by the Act was launched shortly after the Act became effective and is now accessible online. *See* FirstGov Homepage, http://www.firstgov.gov (last visited Nov. 19, 2005).

challenged.[51] Ultimately, the agency's response to the challenge will also be posted in the docket.[52] This transparency should reduce concerns about delays or potential harms that are often cited as reasons for requiring agencies to use additional procedures to respond to information quality requests in rulemaking.[53]

Thus, while the Information Quality Act probably applies substantively to information disseminated in rulemaking, the Act should not be interpreted to require agencies to establish additional administrative procedures to respond to information quality concerns that are raised in rulemaking. This should not impose significant additional burdens on agency rulemaking. OMB's guidelines provide that agencies are only required to undertake "the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved,"[54] and recognize that for some complaints "an agency may decide that no response is necessary."[55] While, pursuant to the Administrative Procedure Act (APA), agencies must respond to information quality concerns in a rational manner,[56] an agency's failure to comply with OMB's information quality guidelines should not, in and of itself, constitute a basis for invalidating the agency's rule. Neither the information quality guidelines nor OMB's peer review guidelines are legislative rules, and they do not have the force of law.[57]

III. JUDICIAL REVIEW

While the Information Quality Act requires agencies to establish administrative appeals procedures, the Act does not explicitly provide for judicial review.[58] Some agencies have asserted, in guidelines to

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51. *See* Regulations.gov, Answers to Frequently Asked Questions, http://www.regulations.gov/fdmspublic-bld61/component/main (follow "FAQ" hyperlink) (last visited Nov. 20, 2005).

52. *See* 5 U.S.C. § 553(c) (2000); 44 U.S.C.A. § 3501 note (West Supp. 2005) (Federal Management and Promotion of Electronic Government Services).

53. *See* Conrad, *supra* note 14, at 542-43.

54. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452, 8458 (Feb. 22, 2002).

55. *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 49,718, 49,721 (Sept. 28, 2001).

56. *See* 5 U.S.C. § 533(c).

57. The APA authorizes courts to overturn agency actions that do not comply with "procedure required by law." *See id.* § 706(2)(D). If the guidelines had the force of law, courts could set aside agency action simply because the agency did not comply with the guidelines. *Id.*

58. *See* Salt Inst. v. Thompson, 345 F. Supp. 2d 589, 601 (E.D. Va. 2004); *In re* Operation of the Mo. River Sys. Litig., 363 F. Supp. 2d 1145, 1174-75 (D. Minn. 2004),

implement the Act, that their decisions under the Act are not subject to judicial review.[59] Nevertheless, on several occasions, persons have asserted authority under the APA to file judicial challenges to agencies' responses to information correction requests.[60] Thus, there remains some dispute regarding whether an agency's decision to change information in response to an information correction request or an agency's refusal to change information in response to an information correction request can be challenged in court.

Ultimately, whether an agency's action under the Information Quality Act is judicially reviewable will likely depend on the action that is being challenged, the context in which the agency made the decision, and the person that is challenging the action. The APA provides that "final agency action" is subject to judicial review[61] unless a statute precludes review or the agency action is committed to agency discretion by law.[62] While the APA does not provide jurisdiction for courts to hear APA challenges, challengers to agency action under statutes other than the Information Quality Act often rely on 28 U.S.C. § 1331 to sue agencies in federal district court.[63] Whether a challenger is able to obtain judicial review of an agency's response to an information correction request under the Information Quality Act will depend, therefore, on whether the agency's action is a final agency action and whether the agency's action is committed to agency discretion by law.[64] In most cases, judicial review of an agency's response to an information correction request will

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aff'd, No. 04-2737, 2005 U.S. App. LEXIS 17224 (8th Cir. 2005); Conrad, *supra* note 14, at 538-39.

59. *See, e.g.*, OFFICE OF ENVTL. INFO., U.S. ENVTL. PROT. AGENCY, EPA/260R-02-008, GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY, OF INFORMATION DISSEMINATED BY THE ENVIRONMENTAL PROTECTION AGENCY 41-43 (2002), *available at* http://www.epa.gov/quality/information guidelines/documents/EPA_InfoQualityGuidelines.pdf; OFFICE OF THE CHIEF INFO. OFFICER, U.S. DEP'T OF ENERGY, 6450-01-P, FINAL REPORT IMPLEMENTING OFFICE OF MANAGEMENT AND BUDGET INFORMATION DISSEMINATION QUALITY GUIDELINES 19, *available at* http://cio.doe.gov/informationquality/finalinfoqualityguidelines.pdf.

60. *See* Complaint at 13-20, Competitive Enter. Inst. v. Bush, No. 03-CV-1670-RJL (D.D.C. Aug. 6, 2003).

61. *See* 5 U.S.C. § 704 (2000).

62. *Id.* § 701(a).

63. 28 U.S.C. § 1331 (2000). The general federal question statute provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.* While this jurisdictional statute does not waive the government's sovereign immunity, the APA waives sovereign immunity for suits against the United States "seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702.

64. *See* 5 U.S.C §§ 701(a), 704. Plaintiffs also need to demonstrate that they have standing to sue. *See* U.S. CONST. art. III, § 2.

not be available because the agency's decision will not be a final agency action.[65] If, however, the agency's response is a final agency action, the decision will probably be subject to judicial review, since it is unlikely that agency decisions under the Information Quality Act are "committed to agency discretion by law."[66]

A. Final Agency Action

There are several actions that an agency might take under the Information Quality Act that might trigger a judicial challenge. First, when an agency is making a report, database, or similar information product available to Congress or the public, a person who asked the agency to correct information in that report might challenge the correction that the agency made, a refusal by the agency to make any correction, or a failure of the agency to respond to the correction request. Similarly, persons other than the person who made the correction request might challenge the agency's response to the request. Judicial challenges under the Information Quality Act may also arise in the rulemaking context, although the extent to which the Act applies to rulemaking is still unclear, as discussed above.[67] When an agency is making a report or other information available as part of the rulemaking process, a person who asked the agency to correct information disclosed in the rulemaking might challenge the correction that the agency made, a denial by the agency to make any correction, or a failure of the agency to respond to the correction request. Similarly, persons other than the person who made the correction request might challenge the agency's response to the request. Although an agency's response to an information correction request in each of those cases is likely to be an "agency action" under the APA,[68] it may not be a final agency action in many of those cases.[69]

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65. *See infra* Part III.A.

66. *See* 5 U.S.C. § 701(a)(2); *infra* Part III.B. While judicial review would be available, OMB Information Quality Guidelines and OMB Peer Review Bulletin are merely guidelines, rather than regulations, and do not have the force of law. Consequently, neither the information quality guidelines nor the peer review guidelines are entitled to *Chevron* deference. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001); Chevron U. S. A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984). Although a court might ultimately determine that an agency's decision to use or disclose information that did not meet the standards of the information quality or peer review guidelines was arbitrary and capricious or otherwise violated the Information Quality Act, noncompliance with the guidelines should not, in and of itself, constitute a basis for invalidating the agency's action.

67. *See supra* Part II.

68. *See* 5 U.S.C. § 551(13). Agency action is defined in the APA as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* When an agency changes information in a report, database,

The Supreme Court has held that an agency action is a final agency action when the agency has completed its decision-making process and its action determines rights or obligations or has a direct and immediate effect on the challenger.[70] Prior to the enactment of the Information

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information product, or as part of a rulemaking in response to an information correction request, the agency's response will likely constitute "relief" under the APA, which is defined as "the whole or a part of an agency . . . (B) recognition of a claim . . . or (C) taking of other action on the application or petition of, and beneficial to, a person," *id.* § 551(11), and, therefore, constitute agency action, *see id.* § 551(13). When an agency refuses to change information in response to an information correction request, the agency decision will normally be issued as an "order" under the APA, *see id.* § 551(6), and, therefore, constitute agency action, *see id.* § 551(13). Even if it were not issued as an order, it would likely constitute denial of "relief," which constitutes agency action. *Id.* § 551(13). Finally, when an agency fails to respond to an information correction request, the "failure to act" may constitute agency action under the APA. *See id.* The Supreme Court recently clarified that the failure to act in the APA's definition of agency action refers to a discrete action, such as a failure to issue a rule, order, license, sanction or other relief. *See* Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2378-79 (2004). Since OMB guidelines require agencies to establish procedures for responding to information correction requests in a timely manner, and many agency guidelines require responses within a specified time period, it is likely that a court would find that an agency's failure to respond to a correction request within the time period specified in the agency's Information Quality Act guidelines constitutes a failure to act and, therefore, is an agency action under the APA.

69. There are other actions that agencies may take, or fail to take, under the Information Quality Act that may be the subject of judicial challenges. For instance, the statute requires agencies to issue Information Quality Act guidelines and to establish correction procedures. *See* 44 U.S.C. § 3516 note (2000) (Policy and Procedural Guidelines). In addition, OMB's Information Quality Act Guidelines require agencies to establish pre-dissemination review procedures and to submit annual reports to OMB regarding compliance with the guidelines. *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452, 8458-60 (Feb. 22, 2002). Since these requirements have not generated significant judicial challenges, this Article focuses primarily on the reviewability of agency responses to information correction requests, which have sparked litigation. OMB's recent peer review guidelines, Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2664 (Jan. 14, 2005), are also likely to spark litigation, but, for reasons discussed below, persons who challenge an agency's failure to comply with the peer review guidelines are likely to have a difficult time demonstrating that the agency's failure to comply with the guidelines has a sufficiently direct and immediate effect on the challenger to constitute final agency action.

70. *See* Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citing Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948), and Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)); Dalton v. Specter, 511 U.S. 462, 469-70 (1994); Franklin v. Massachusetts, 505 U.S. 788, 798 (1992); Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967). In *Bennett*, the Court held that "[f]irst, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 177-78 (citation omitted) (quoting *Port of Boston*, 400 U.S. at 71).

Quality Act, courts frequently held that the disclosure of information by agencies does not constitute final agency action unless the disclosure is intertwined with another reviewable agency action or the disclosure triggers other regulatory effects.[71] Courts have frequently recognized that information disclosure may affect the public perception of companies and products and may make consumers less likely to buy products from companies, but have held that the public reaction is an indirect, rather than direct effect, of agency action, which does not convert the information disclosure into a final agency action.[72] However, the United States Court of Appeals for the D.C. Circuit has suggested, in *Industrial Safety Equipment Ass'n v. Environmental Protection Agency*,[73] that there may be extreme situations where an agency's disclosure of information could constitute a reviewable "sanction" if the agency intended to penalize a party through adverse publicity, especially false or unauthorized publicity, and the disclosure caused "'destruction . . . of property,' or 'revocation . . . of a license.'"[74]

In light of the precedent that predates the Information Quality Act, challenges to agency responses to information correction requests in the rulemaking context are unlikely to be reviewable as final agency action until the agency completes the rulemaking process.[75] An agency's response to a request to correct information disseminated in rulemaking

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71. *See, e.g.*, Flue-Cured Tobacco Coop. Stabilization Corp. v. U. S. Envtl. Prot. Agency, 313 F.3d 852, 859-61 (4th Cir. 2002); Indus. Safety Equip. Ass'n v. Envtl. Prot. Agency, 837 F.2d 1115, 1119 (D.C. Cir. 1988); Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n, 710 F.2d 1165, 1176 (6th Cir. 1983).

72. *See Flue-Cured Tobacco*, 313 F.3d at 860-61; *Indus. Safety Equip. Ass'n*, 837 F.2d at 1121. In the *Flue-Cured Tobacco* case, the Fourth Circuit held that an EPA report that classified environmental tobacco smoke as a carcinogen was not a final agency action, even though other agencies imposed additional restrictions on smoking because of the findings in the report, and even though the report might lead private groups to impose tobacco related restrictions. *Flue-Cured Tobacco*, 313 F.3d at 860-61. The court stressed that the actions of other agencies and the public were "independent responses and choices of third parties" and were not "the result of legal rights or consequences created by the report." *Id.* at 861. The court noted that if it "were to adopt the position that agency actions producing only pressures on third parties were reviewable under the APA, then almost any agency policy or publication issued by the government would be subject to judicial review." *Id.*

73. 837 F.2d 1115 (D.C. Cir. 1988).

74. *Id.* at 1119 (alterations in original) (quoting 5 U.S.C. § 551(10) (2000)). However, the D.C. Circuit concluded that the EPA asbestos guidance that the challengers sought to overturn in that case was not reviewable because the EPA did not intend to penalize the challengers when it issued the guidance. *Id.*

75. *Cf. Flue-Cured Tobacco*, 313 F.3d at 860-61. The challenges to information correction requests in rulemaking will not be reviewable regardless of whether the agency action is a grant, denial, or failure to respond to a request and regardless of whether the challenge is brought by the person requesting the correction or a third party. *See* discussion *supra* notes 68-69 and accompanying text.

will normally be unreviewable because the agency will not have completed its decision-making process.[76] It is not clear how the agency will use the information disseminated in the rulemaking until the agency finalizes the rule. When the agency completes the rulemaking process and issues a final rule, the agency's grant of, denial of, or failure to respond to an information request might be reviewable in the same way that an agency's response, or failure to respond to comments would be reviewable at that time.[77]

Outside of the rulemaking context, it will be difficult to prove that an agency's response to an information correction request constitutes final agency action, since the agency's response will not likely have a direct and immediate effect on potential challengers.[78] However, it may be easier for *businesses and regulated entities* to demonstrate that an agency's response to an information correction request constitutes a final agency action than it would be for *public interest groups*. If an agency responded to an information correction request regarding information disclosed in a report, enforcement database, risk database, or other information product by changing information in a manner sought by a business or regulated entity, the agency would likely be modifying information to suggest that the activities addressed in the report, database, or information product pose less harm to health or the environment than the agency originally suggested. Assuming that the change constitutes the consummation of agency decision making, which is a questionable assumption,[79] businesses and regulated entities would be unlikely to challenge the change, which they sought, and public interest groups would be unable to demonstrate that the change had any direct and immediate effect on them.[80] Thus, the change would not be a final agency action.

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76. *See Bennett*, 520 U.S. at 177-78 (determining that agency action that is tentative or interlocutory is not final agency action); *Gardner*, 387 U.S. at 151 (asserting that agency action is not final until the agency has concluded its decision-making process).

77. Challengers could argue that the agency's correction or failure to correct information that the agency relied upon in the rulemaking was arbitrary and capricious, 5 U.S.C. § 706(2)(A) (2000), or that the decision violated the Information Quality Act, *id.* § 706(2)(C).

78. *See, e.g.*, *Flue-Cured Tobacco*, 313 F.3d at 859-61. In most cases, an agency's disclosure of information in a report, database, or other information product will not trigger other regulatory effects or create any rights or obligations for businesses or regulated entities. While the disclosure may encourage other agencies or third parties to take some action against businesses or regulated entities, those effects will be indirect. *See supra* note 72 and accompanying text.

79. *See supra* note 70.

80. *See supra* notes 71-72 and accompanying text. Although an agency's decision to correct information to suggest that products or activities are less harmful than the agency originally suggested may encourage other agencies to loosen regulatory controls over the

If, on the other hand, the agency refused to change the information in a report, database, or other information product in response to an information correction request by a business or regulated entity, or if it changed information in response to a request by a public interest group, public interest groups would be unlikely to challenge the agency's action. However, businesses and regulated entities might challenge the agency's action if the information disclosed by the agency suggested that the challenger, or one of the challenger's products, posed a harm to health or the environment and there is a remote chance that a court could, in an extreme situation, conclude that the agency's response constituted a final agency action.[81] In most cases, though, while the government's disclosure of information could harm the challenger's reputation and cause the public to buy fewer products from the challenger, that harm would be indirect and would not convert the agency's decision into a final action.[82] A federal district court in Virginia recently adopted that reasoning and held, in *Salt Institute v. Thompson*,[83] that the release of a report by the Department of Health and Human Services that recommended that persons limit their sodium intake to moderately low levels did not have a legal impact on the Salt Institute or the United States Chamber of Commerce and was not, therefore, a final agency action.[84]

While unfavorable agency responses to information correction requests by businesses or regulated entities or favorable responses to information correction requests by public interest groups should normally not constitute final agency action, a court that adopts the approach discussed by the D.C. Circuit in *Industrial Safety Equipment Ass'n* might hold that an agency's disclosure of information that constitutes a sanction of the challenger is reviewable as a final agency action.[85] Thus, while it is hard to imagine a scenario in which a public

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products or activities, or may encourage enforcement officials, businesses, or the public to focus less attention on the potential harms caused by those products or activities, those actions of agencies or third parties are indirect effects of the agency's action. *See supra* notes 71-72 and accompanying text.

81. *See infra* note 84 and accompanying text.

82. *See supra* notes 71-72 and accompanying text.

83. 345 F. Supp. 2d 589 (E.D. Va. 2004).

84. *Id.* at 602. In that case, the Salt Institute also argued that the National Heart, Lung and Blood Institute violated the Information Quality Act when it failed to disclose data underlying an experiment that one of the agency's grantees conducted. *Id.* at 593. The court determined that the plaintiffs lacked standing to bring that challenge, but the court did not directly address whether the failure to disclose data constituted a final agency action that would be reviewable under the APA. *Id.* at 598-602.

85. *See* Indus. Safety Equip. Ass'n, Inc. v. Envtl. Prot. Agency, 837 F.2d 1115, 1119 (D.C. Cir. 1988). A court that adopts the approach of *Industrial Safety Equipment Ass'n* might conclude that an agency's disclosure of information regarding the health or environmental harm that could be caused by a business' products or activities constitutes a

interest group could challenge an agency's response to an information correction request as a final agency action, there may be some extreme situations in which a business or regulated entity might be able to challenge an agency's response as a final agency action.

B. Committed to Agency Discretion

If an agency's action under the Information Quality Act constitutes a final agency action, it will be reviewable by a plaintiff who has standing unless the action that is challenged is "committed to agency discretion by law."[86] The committed to agency discretion by law exemption to APA review applies in "*rare instances* where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[87] The Supreme Court held, in *Heckler v. Chaney*,[88] that the exception applies when a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[89] Although the Supreme Court has been reluctant to apply the exemption, two federal district courts have concluded that agency actions under the Information Quality Act were not reviewable because they were committed to agency discretion by law.[90]

In *In re Operation of the Missouri River System Litigation*,[91] the United States District Court for the District of Minnesota held that the failure of the Army Corps of Engineers and the United States Fish and Wildlife Service to provide the challengers with information in response to a request for a correction of information under the Information Quality Act was not reviewable under the APA.[92] While the court recognized that the statute requires OMB to issue guidelines "for ensuring and maximizing the quality, objectivity, utility, and integrity of information

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reviewable sanction if the agency intended to penalize the business and the disclosure caused "'destruction . . . of property.'" *Id.* (alteration in original) (quoting 5 U.S.C. § 551(10)).

86. 5 U.S.C. § 701(a) (2000).

87. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (emphasis added) (quoting S. REP. NO. 79-752, at 26 (1945)).

88. 470 U.S. 821 (1985).

89. *Id.* at 830.

90. *See Salt Inst.*, 345 F. Supp. 2d at 602-03; *In re* Operation of the Mo. River Sys. Litig., 363 F. Supp. 2d 1145, 1174-75 (D. Minn. 2004).

91. 363 F. Supp. 2d 1145 (D. Minn. 2004).

92. *Id.* at 1174-75. The Flood Control Act of 1944 requires the U.S. Army Corps of Engineers to prepare and periodically revise a plan for management of the Missouri River and its reservoirs. *Id.* at 1150. Several businesses and business coalitions sued the Corps when the agency did not provide them with information that the businesses requested under the Information Quality Act regarding the science and data that the agency relied upon when it revised the management plan. *Id.* at 1174.

disseminated by [federal] agenc[ies],[93] the court held that neither the text of the statute nor its legislative history adequately defined the terms "quality, objectivity, utility, and integrity."[94] Thus, the court held that the statute did not provide any meaningful standard against which to evaluate agencies' discretion in complying with the statute.[95]

In *Salt Institute*,[96] the United States District Court for the Eastern District of Virginia reached a similar conclusion by focusing on OMB guidelines, as well as the statute.[97] The *Salt Institute* court concluded that the National Heart, Lung, and Blood Institute's recommendations regarding sodium intake were not reviewable because the statute did not provide "manageable standards" that would allow a court to determine "whether an agency properly exercised its discretion in deciding a request to correct a prior communication."[98] In addition, the court suggested that agency actions under the Information Quality Act are committed to agency discretion by law because the *guidelines* of OMB, rather than the statute itself, provide virtually limitless discretion to agencies to grant or deny correction requests.[99] The *Salt Institute* court cited *Steenholdt v. Federal Aviation Administration*,[100] a decision of the United States Court of Appeals for the D.C. Circuit, as support for its decision.[101] In *Steenholdt*, the D.C. Circuit concluded that the Federal Aviation Administration (FAA) administrator's decision to terminate a designated engineering representative's responsibility to inspect aircrafts was not reviewable because the Federal Aviation Act authorized the administrator to rescind a designation "'at any time for any reason the Administrator considers appropriate.'"[102]

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93. *Id.* at 1174-75.

94. *Id.*

95. *Id.* at 1175.

96. 345 F. Supp. 2d 589 (E.D. Va. 2004).

97. *Id.* at 602-03.

98. *Id.* at 602.

99. *See id.* at 602-03. The court noted that "guidelines provide that '[a]gencies, in making their determination of whether or not to correct information, may reject claims made in bad faith or without justification, and are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved.'" *Id.* at 602 (alteration in original) (quoting Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452, 8458 (Feb. 22, 2002)).

100. 314 F.3d 633 (D.C. Cir. 2003).

101. *See Salt Inst.*, 345 F. Supp. 2d at 602 (citing *Steenholdt*, 314 F.3d at 638).

102. *Steenholdt*, 314 F.3d at 638-39 (quoting 49 U.S.C. § 44,702(d)(2) (1997)). The regulations promulgated under the Act also gave the Federal Aviation Administration (FAA) administrator unlimited discretion, in that they allowed the administrator to rescind a designation "for any reason the Administration considers appropriate." 14 C.F.R. § 183.15(d)(6) (2005). However, the regulations merely echoed the authority that

The *Missouri River* and *Salt Institute* courts both misinterpreted the committed to agency discretion exemption to APA review. As the Supreme Court suggested in *Citizens to Preserve Overton Park v. Volpe*,[103] the exception is a narrow exception that is rarely used.[104] Agency actions under the Information Quality Act bear little resemblance to actions that the Supreme Court has previously held to be exempt from review under the committed to agency discretion exemption. In *Heckler v. Chaney*,[105] the Court held that an agency's exercise of enforcement discretion may be exempt from review under the exception when a statute does not place a limit on the agency's exercise of enforcement discretion.[106] In *Webster v. Doe*,[107] the Court held that the CIA director's decision to terminate an employee was not reviewable, as the National Security Act authorized the director to terminate employees whenever the director deemed "'termination necessary or advisable in the interests of the United States.'"[108] Thus, the Supreme Court has limited application of the exemption to cases where a statute provides no standard to direct an agency's actions or where the statute delegates virtually limitless authority to an agency by giving the agency the authority to make decisions for any reason the agency determines is appropriate, necessary, or advisable.[109] The Information Quality Act does not delegate such broad authority to agencies. The statute sets a clear standard for agency decision making by requiring, in essence, that agencies should ensure and maximize the "quality, objectivity, utility,

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the statute provided to the administrator. *See* 49 U.S.C. § 44,702(d)(2) (2000). Thus, the *Salt Institute* court misread the *Steenholdt* decision when the court suggested that a broad delegation of authority in regulations is sufficient to render agency action nonreviewable as committed to agency discretion. *See Salt Inst.*, 345 F. Supp. 2d at 602 (quoting 5 U.S.C. § 701(a)(2) (2000)).

103. 401 U.S. 402 (1971).

104. *Id.* at 410. As the Court noted in *Heckler v. Chaney*, 470 U.S. 821 (1985), since the APA authorizes courts to overturn agency actions when an agency abuses its discretion, discretionary agency actions are generally reviewable. *Id.* at 829-30.

105. 470 U.S. 821 (1985).

106. *Id.* at 831-32. However, the Court held that an agency's exercise of enforcement discretion may be reviewable when a statute provides "guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833.

107. 486 U.S. 592 (1988).

108. *Id.* at 600 (quoting 50 U.S.C. § 403(c) (1982)). The Court noted that the statute allowed termination of an agency employee "whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States' . . ., not simply when the dismissal *is* necessary or advisable to those interests." *Id.* (quoting 50 U.S.C. § 403(c) (1982)). The court suggested that the statutory language "exude[d] deference to the Director, and appear[ed] to us to foreclose the application of any meaningful judicial standard of review." *Id.*

109. *See id.* at 601.

and integrity of information" that they disseminate.[110] Although some of those terms may be ambiguous, the Act does not give agencies unfettered discretion to disseminate information or to refuse to change information that they are disseminating as they deem appropriate, necessary, or advisable.[111] Although OMB guidelines delegate broad authority to agencies regarding their responses to information correction requests, courts should examine statutes, rather than regulations, to determine whether an agency action is committed to agency discretion.[112]

While the language of the Information Quality Act is distinguishable from the language used in other statutes where courts found that there was no law to apply, academics and case law suggest that the committed to agency discretion exemption does not focus simply on the breadth of authority delegated to agencies by statutes.[113] In his dissenting opinion in *Webster*, Justice Scalia suggested that the exception incorporates a "common law of judicial review," which provides that political questions, separation of powers issues, sensitive and discretionary agency decisions,

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110. 44 U.S.C. § 3516 note (2000) (Policy and Procedural Guidelines). The Act requires OMB to issue guidelines to "Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by Federal agencies in fulfillment of the purposes and provisions of . . . the Paperwork Reduction Act." *Id.* It also requires federal agencies to issue guidelines "ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by the agency." *Id.*

111. *See Webster*, 486 U.S. at 601.

112. The *Salt Institute* court incorrectly relied upon the D.C. Circuit's *Steenholdt* decision to suggest that an agency's action may be unreviewable when the agency is acting pursuant to *regulations* that give the agency virtually unlimited authority. *See* Salt Inst. v. Thompson, 345 F. Supp. 2d 589, 602 (E.D. Va. 2004); *supra* notes 101-02 and accompanying text. While agencies can limit, by regulation, authority delegated to them by Congress, they cannot expand their authority by regulation. *See* 5 U.S.C. § 706(2)(c) (2000). Thus, if a statute provides standards for an agency to use when making a decision, but the agency, by regulation, broadens its discretion to make that decision, a reviewing court should hold that the regulation is ultra vires, rather than holding that the agency action is unreviewable. *See id.*

113. *See, e.g.*, *Webster*, 486 U.S. at 606-10 (Scalia, J., dissenting); Kenneth Culp Davis, *"No Law To Apply,"* 25 SAN DIEGO L. REV. 1, 9-11 (1988); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 734 (1990). Like Justice Scalia, Justice O'Connor wrote separately in *Webster v. Doe*. *See Webster*, 486 U.S. at 605 (O'Connor, J., concurring in part and dissenting in part). In her concurring and dissenting opinion, Justice O'Connor joined in the Court's holding that the CIA director's employment decision was unreviewable, but she wrote that she did "not understand the Court to say that the [committed to agency discretion] exception . . . is necessarily or fully defined by reference to statutes 'drawn in such broad terms that in a given case there is no law to apply.'" *Id.* (quoting Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 410 (1971)). Similarly, Justice Scalia, in his dissenting opinion, wrote that "'commit[ment] to agency discretion by law' includes, but is not limited to, situations in which there is 'no law to apply.'" *Id.* at 607 (Scalia, J., dissenting) (alteration in original).

and other agency actions are nonreviewable even when there may be law to apply.[114] Examining the precedent cases in that light, there are strong policy reasons supporting non-reviewability of an agency's determination regarding the optimal allocation of limited enforcement resources in *Chaney*,[115] and the CIA director's balancing of national security interests in *Webster*.[116] In the wake of the September 11, 2001, hijackings that led to the World Trade Center destruction, the D.C. Circuit's decision in *Steenholdt* to exempt review of the FAA administrator's decision to rescind aircraft safety inspection authority also seems to fit within the categories of actions that Justice Scalia suggests are nonreviewable under a common law of judicial review, although the *Steenholdt* court did not articulate security concerns as a basis for its decision.[117] The Information Quality Act, on the other hand, does not implicate concerns about national security, separation of powers, political questions, or any other area that has been traditionally unreviewable.[118] Thus, even if the committed to agency discretion exemption applies more broadly than to situations where there is no law to apply, the exemption should not apply to agency actions under the Information Quality Act.

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114. *See Webster*, 486 U.S. at 608-10 (Scalia, J., dissenting). In describing the approach that the *Webster* majority took, and other courts take, regarding the committed to agency discretion exemption, Justice Scalia suggested that "although the Court recites the test it does not really apply it. Like other opinions relying upon it, this one essentially announces the test, declares victory and moves on." *Id.* at 610. The Supreme Court implicitly relied upon the common law of unreviewability previously in *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

115. *Chaney*, 470 U.S. at 831. The Court stressed that agencies must balance a number of factors within their expertise when deciding whether to bring an enforcement action, including

> whether a violation has occurred, . . . whether agency resources are best spent on [one] violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all.

Id. The Court noted that an agency's exercise of enforcement discretion was traditionally unreviewable and that "the APA did not significantly alter the 'common law' of judicial review of agency action." *Id.* at 832.

116. *Webster*, 486 U.S. at 601. The Court stressed that "the Nation's security, depend[s] in large measure on the reliability and trustworthiness of the [CIA's] employees" and that there is an "overriding need for ensuring integrity in the Agency" that prompted Congress to give the CIA director the broad discretion to dismiss employees whenever the director deems that it is necessary or advisable in the interests of the United States. *Id.*

117. *See* Steenholdt v. Fed. Aviation Admin., 314 F.3d 633, 638-39 (D.C. Cir. 2003). The *Steenholdt* court simply announced the "no law to apply" test, declared victory, and moved on. *Id.*

118. *See* 44 U.S.C. § 3516 note (2000) (Policy and Procedural Guidelines); *Webster*, 486 U.S. at 608-09 (Scalia, J., dissenting).

IV. CONCLUSION

While the Information Quality Act has already proven to be a powerful tool to influence government decision making, the extent to which it ultimately contributes to the ossification of rulemaking, encourages the government to reduce information disclosure, and changes the manner in which the government balances risks will depend on the extent to which it applies to rulemaking and the extent to which judicial review is available under the Act.

Although the Information Quality Act probably applies to rulemaking, agencies should be able to respond to most information quality complaints in the normal course of rulemaking, without using additional procedures. OMB guidelines likely apply to information disseminated in rulemaking, but the guidelines are merely guidelines, so noncompliance should not, in and of itself, constitute grounds for invalidating an agency's rule.

In the rulemaking context, judicial review will generally be unavailable until the agency completes the rulemaking process. At that point, challengers can raise Information Quality Act challenges as well as more traditional challenges to the rule under the APA or the statute that authorized the agency to issue the rule.

Outside of rulemaking, judicial review under the Information Quality Act will generally not be available because the agency actions challenged in information correction requests are unlikely to be final agency actions. If, however, the agency actions challenged *are* final agency actions, judicial review will probably be available, since an agency's action under the Information Quality Act is not committed to agency discretion by law.